KOH THONG CHUAN

v.

THE OFFICIAL ASSIGNEE OF THE PROPERTY OF KOH LIANG HEE, BANKRUPT

COURT OF APPEAL, KUALA LUMPUR
GOPAL SRI RAM JCA
NH CHAN JCA
HAIDAR MOHD NOOR JCA
[CIVIL APPEALS NO: W-02-162-1997 & W-02-169-1997]
25 NOVEMBER 2002

BANKRUPTCY: *Voluntary settlement - Fraudulent conveyance - Conveyance of property - Land owner served with bankruptcy petition five months later - Doctrine of relation back - Whether applicable - Whether there was fraud - Whether transaction rendered void - Whether title to vest in official assignee*

LAND LAW: *Charges - Equitable charge - Official assignee vested with equitable interest over property of bankrupt - Transfer of property from bankrupt to first party declared void - Defendant bank registered legal charges on said property upon loan granted to first party - Registration - Failure by official assignee to register interest in property pursuant to s. 349 of National Land Code - Whether legal interest prevails over equitable interest - Whether defendant bank a bona fide purchaser for value and without notice - Whether official assignee to take property subject to legal charge*

LAND LAW: *Indefeasibility of title and interest in land - Fraud - Title vested in first party declared void on ground of fraud - Defendant bank registered legal charges on said property upon loan granted to first party - Whether legal interest prevails over equitable interest - Whether defendant bank a bona fide purchaser for value and without notice*

One Koh Liang Hee ('the bankrupt') had sold a piece of landed property ('the said property') to his son, the first defendant/appellant, *vide* a sale and purchase agreement for RM1 million on 22 September 1990. The said property was registered in the first defendant's name on 26 March 1991. The first defendant subsequently applied for loan from second defendant/appellant who then registered two legal charges against the said property.

On 15 August 1991, United Malayan Banking Corporation ('UMBC') presented a bankruptcy petition against the bankrupt and subsequently obtained receiving and adjudication orders against him on 3 July 1992.

The plaintiff/respondent was the official assignee and in acting for the estate of the bankrupt, had successfully obtained the following orders from the High Court. Against the first defendant, a declaration that the conveyance of the said property to the first defendant was void under ss. 47 and/or 52 of the Bankruptcy Act 1967 ('the Act') and that they had an equitable interest over the said property. In relation to the second defendant, the charges created were declared void and furthermore, by virtue of ss. 47 and 53B(2) of the Act and s. 340(4) of the National Land Code ('NLC'), the plaintiff was entitled to recover the said property from the first defendant free from the second defendant's legal charges.

The first defendant and the second defendant appealed separately to this court against the said decision.

Held:
Per Haidar Mohd Noor JCA

[1] In computing the time for the purpose of relation back under s. 47 of the Act regarding the alleged fraudulent transfer of the said property as an act of bankruptcy, the High Court judge had correctly took the date of the registration of the said property, *ie*, 26 March 1991, rather than the date of the execution of the alleged sale and purchase agreement which was 22 September 1990. (pp 133 g-h)

[2] The transfer of the said property by the bankrupt to his son inevitably raised suspicion as to whether the said transaction was *bona fide* so as to defeat or delay the creditors. However, mere suspicion is insufficient to render a transaction fraudulent. There must be supporting facts pointing towards a strong inference that the conveyance was fraudulent within the meaning of s. 3(1)(b) of the Act. (p 135 c-d)

[3] The trial judge had noted the close proximity between the conveyance of the said property and other transactions as well as the time when these transactions took place, *ie*, at a period when the family faced severe financial hardship. Due regard was also given to the magnitude of loans involved in those transactions and the fact that they involved almost similar proprietors. Additionally, the judge had analysed the consideration paid for the said property which was described as self-serving. An examination was further conducted regarding the intention of the parties in the conveyance where it was found that the bankrupt had transferred the property to the first defendant to ensure its safety from an impending financial disaster. (pp 135 f, g & 136 b)

[3a] Based on the facts, the trial judge was correct in holding that the said transfer of property from the bankrupt to the first defendant was a fraudulent conveyance which constituted an act of bankruptcy within s. 3(1)(b) of the Act. This rendered the conveyance void and by virtue of s. 53B(1) of the Act, the said property was deemed to be the property of the official assignee. (p 136 e-f)

[4] In relation to the second defendant, the plaintiff would have to take the said property subject to the legal charges registered therein. (p 141 d)

[4a] A landed property would only be vested in the plaintiff by way of registration pursuant to s. 349 of the NLC. Until such time, the plaintiff is vested with an equitable interest in the said property. In accordance with legal principles, the legal interest in the charges acquired by the second defendant, as a *bona fide* purchaser for value and without notice, would overreach the plaintiff's equitable interest. This reasoning also rendered the second defendant's interest, as the registered chargees, indefeasible. (p 138 b & g-h)

[4b] In the present case, there was a finding of fraudulent transfer of the said property and the transfer was avoided by the court below, but the title of the said property had yet to be vested in the plaintiff pursuant to s. 349 of the NLC as no action had been taken by the plaintiff to that effect. Therefore, it follows that the plaintiff only has an equitable interest in the property. (p 140 h)

[5] Whilst s. 53B(1) of the Act generally allows the official assignee to recover property from a party who acquires it from a bankrupt, s. 53B(3) provides an exception to this rule where subsequent acquirers had given valuable consideration and acted in good faith, in which case recourse could only be had to persons who entered into the transaction with the bankrupt, here being the first defendant. (p 141 b-c)

[First defendant's appeal dismissed with costs; second defendant's appeal allowed with costs.]

*[**Bahasa Malaysia** Translation Of Headnotes*

Koh Liang Hee ('bankrap') telah menjual sebuah hartanah ('harta berkenaan') kepada anaknya, defendan/perayu pertama, melalui suatu perjanjian jualbeli untuk RM1 juta pada 22 September 1990. Hartanah tersebut telah didaftarkan atas nama defendan pertama pada 26 Mac 1991. Kemudiannya, defendan pertama telah memohon untuk suatu pinjaman dari defendan/perayu kedua yang mana telah mendaftarkan dua gadaian undang-undang atas hartanah tersebut.

Pada 15 Ogos 1991, United Malayan Banking Corporation ('UMBC') telah menyerahkan suatu petisyen kebankrapan ke atas bankrap dan seterusnya telah mendapatkan perintah-perintah penerimaan dan penghukuman terhadapnya pada 3 Julai 1992.

Pihak plaintif/responden merupakan pegawai pemegang harta dan dalam mewakili estet bankrap, telah berjaya mendapatkan perintah-perintah berkenaan dari Mahkamah Tinggi. Terhadap defendan pertama, suatu deklarasi bahawa pemindahhakkan hartanah tersebut kepada defendan pertama adalah taksah dibawah ss. 47 dan/atau 52 Akta Kebankrapan 1967 ('Akta') dan bahawa mereka mempunyai kepentingan ekuiti atas hartanah tersebut. Berkenaan dengan defendan kedua, gadaian yang didaftarkan diisytiharkan taksah dan tambahan pula, dibawah ss. 47 dan 53B(2) Akta dan s. 340(4) Kanun Tanah Negara ('KTN'), pihak plaintif berhak untuk mendapatkan semula hartanah berkenaan dari defendan pertama bebas daripada gadaian-gadaian undang-undang defendan kedua.

Defendan pertama dan kedua telah membuat rayuan berasingan ke mahkamah ini berkenaan dengan keputusan tersebut.

Diputuskan:
Oleh Haidar Mohd Noor HMR

[1] Dalam mengira masa untuk tujuan "relation back" di bawah s. 47 Akta berkenaan dengan pengataan pindahmilik palsu hartanah berkenaan sebagai suatu perbuatan kebankrapan, hakim Mahkamah Tinggi telah dengan betulnya memakai tarikh pendaftaran hartanah berkenaan, iaitu 26 Mac 1991, dan tidak tarikh pelaksanaan perjanjian jualbeli pada 22 September 1990.

[2] Pindahmilik hartanah berkenaan daripada bankrap kepada anaknya pastinya mewujudkan sangsi sama ada transaksi tersebut *bona fide* untuk mengalahkan atau melambatkan pemiutang. Akan tetapi, sangsi sahaja tidak mencukupi untuk memberi gambaran bahawa transaksi tersebut adalah palsu. Perlu ada fakta-fakta menyokong yang menunjukkan suatu inferens yang kuat bahawa pemindahhakkan adalah palsu dalam definasi s. 3(1)(b) Akta.

[3] Hakim perbicaraan telah mengambil perhatian mengenai kedekatan pemindahhakkan hartanah tersebut dan transaksi-transaksi lain dan juga jangkamasa transaksi-transaksi berlaku, iaitu pada masa di mana keluarga tersebut mengalami kesusahan kewangan yang teruk. Juga dimaklumkan jumlah pinjaman yang terlibat dalam transaksi-transaksi tersebut dan fakta bahawa mereka melibatkan pemilik-pemilik yang hampir sama.

Tambahan pula, hakim telah menganalisakan balasan yang dibayar untuk hartanah berkenaan yang dianggapkan sebagai untuk melancarkan tujuan sendiri. Suatu pemeriksaan turut diadakan terhadap niat pihak-pihak dalam pemindahhakkan di mana didapati bahawa bankrap telah memindah hakmilik hartanah tersebut kepada defendan pertama untuk memastikan keselamatannya daripada suatu malapetaka kewangan yang akan berlaku.

[3a] Berpandukan kepada fakta-fakta, hakim perbicaraan dengan betulnya telah mendapati bahawa pemindahan hak-milik hartanah daripada bankrap kepada defendan pertama adalah suatu pemindahhakkan yang palsu yang merupakan suatu perbuatan kebankrapan di bawah s. 3(1)(b) Akta. Ini menjadikan pemindahhakkan taksah dan di bawah s. 53B(1) Akta, hartanah tersebut diputuskan sebagai harta pegawai pemegang harta.

[4] Berkenaan dengan defendan kedua, plaintif harus mengambil hartanah tersebut tertakluk kepada gadaian-gadaian undang-undang yang telah didaftar.

[4a] Suatu hartanah hanya akan terletakhak dalam plaintif melalui pendaftaran di bawah s. 349 KTN. Sehingga masa tersebut, plaintif hanya terletakhak dengan suatu kepentingan ekuiti dalam hartanah tersebut. Dalam mengikuti prinsip undang-undang, kepentingan undang-undang dalam gadaian-gadaian yang diperolehi oleh defendan kedua, sebagai pembeli *bona fide* untuk nilai dan tanpa notis, akan mengatasi kepentingan ekuiti plaintif. Penjelasan ini juga menjadikan kepentingan defendan kedua, sebagai pemegang gadaian berdaftar, tidak boleh disangkal.

[4b] Dalam kes ini, terdapat pendapat adanya suatu pindah milik hartanah tersebut yang palsu dan pindah milik tersebut telah ditolak oleh mahkamah dbawah, tetapi hakmilik hartanah tersebut belum diletakhak kepada plaintif dibawah s. 349 KTN kerana tiada tindakan yang telah diambil oleh plaintif untuk tujuan tersebut. Oleh yang demikian, plaintif hanya mempunyai kepentingan ekuiti dalam hartanah tersebut.

[5] Manakala s. 53B(1) Akta secara lazimnya membenarkan pegawai pemungut harta untuk mendapatkan semula harta daripada pihak yang mendapatkannya dari seseorang bankrap, s. 53B(3) memberikan kecualian kepada hukum ini dimana pemilik selepas ini telah memberi balasan berharga dan berlaku dengan suci hati, dalam mana satu-satunya jalan keluar hanya terhadap mereka yang telah memasuki transaksi dengan bankrap, di sini merupakan defendan pertama.

Rayuan defendan pertama ditolak dengan kos; rayuan defendan kedua dibenarkan dengan kos.]

Case(s) referred to:
Abirami MM & Anor v. MSMM Meyappa Chettiar [1959] MLJ 149 ***(refd)***
Krishnadas Achutan Nair & Ors v. Maniyam Samykano [1997] 1 CLJ 636 ***(refd)***
Lian Keow Sdn Bhd (in liquidation) v. Overseas Credit Finance (M) Sdn Bhd [1988] 2 MLJ 449 ***(refd)***
Mercantile Bank Ltd v. The Official Assignee of the Property of How Han Teh [1969] 2 MLJ 196 ***(refd)***
Overseas Union Finance Ltd v. Lim Foo Chong [1971] 2 MLJ 124 ***(refd)***
Pegawai Pemegang Harta Koh Liang Hee, Bankrap v. Koh Thong Chuan & Anor [1997] 2 CLJ Supp 241 ***(refd)***
PJTV Denson (M) Sdn Bhd & Ors v. Roxy (M) Sdn Bhd [1980] 2 MLJ 136 ***(refd)***
Re Khor Bak Kee [1936] MLJ (Rep) 5 ***(refd)***
Re Kwan Chew Shen T/A Syarikat Kaaf [1987] 1 CLJ 314; [1987] CLJ (Rep) 704 ***(refd)***
Re Louis Theresa Khoo [1965] 2 MLJ 223 ***(refd)***
Re Yeow Heap Seng ex p Official Assignee [1965] 2 MLJ 67 ***(refd)***

Legislation referred to:
Bankruptcy Act 1967, ss. 2, 3(1)(b), (i), 24, 47, 52, 53B(3), (2)
Courts of Judicature Act 1964, s. 42
National Land Code, ss. 340(1), (2), (3), (4)(b), 349

Other source(s) referred to:
Halsbury's Laws of England, 4th edn, vol 4, p 514

(Civil No: W-02-162-97)
For the 1st appellant - En Muker; M/s Lovelace & Hastings
For the respondent - Tommy Thomas (Alan Gomez); M/s Tommy Thomas

(Civil No: W-02-169-97)
For the 2nd appellant - Darryl SC Goon (Ng Sai Yeang); M/s Raja, Darryl & Loh
For the respondent - Tommy Thomas (Alan Gomez); M/s Tommy Thomas

[Appeal from High Court, Kuala Lumpur; Suit No: S5-22-290-1995]

Reported by M Maheswaran

JUDGMENT

Haidar Mohd Noor JCA:

The two appeals *viz*, No. W-02-162-1997 and No. W-02-169-1997 were heard together by us as they arose out of one action in the court below *vide* suit No. S5-22-290-1995. I will refer the appellant in appeal No. W-02-162-1997 as the first appellant and the appellant in appeal No. W-02-169-1997 as the second appellant. The respondent is common to both appeals. The respondent acts for the estate of the bankrupt, ie, Koh Liang Hee. It is to be noted that the first appellant is the son of the bankrupt.

After hearing the submissions of the parties, we reserved our decision. It is rather unfortunate that since then, one of the members of the panel, NH Chan, JCA (as he then was) has retired. I will now proceed to give my decision.

The issue against the first appellant relates to the conveyance of a property of the bankrupt to him. The property is a piece of landed property held under Grant No. 12474, Lot 94, Section 43, District of Kuala Lumpur, on which is a bungalow house with a civic address of No. 25, Jalan Yap Kwang Seng, Kuala Lumpur ("the said property"). The conveyance was by way of a purported written sale and purchase agreement executed by them on 22 September 1990 for a consideration of RM1 million. The respondent succeeded in obtaining a declaratory order of the court below that the conveyance of the said property from the bankrupt to his son, the first appellant, is void under s. 47 and/or 52 of the Bankruptcy Act 1967 ("the Act"). There was a further declaratory order that the said property is vested by way of equity in the respondent. Other consequential were also made for which we are not concerned here.

The issue against the second appellant is in respect of the two charges created by the first appellant in favour of the second appellant in which the respondent succeeded in obtaining a declaratory order from the court below that the charges created are void against the respondent. There was a further declaratory order that by virtue of ss. 47 and 53B(2) of the Act and s. 340(4) of the National Land Code 1965 ("the Code") the respondent is entitled to recover the said property from the first appellant free from the second appellant's legal charges.

Put shortly, there are two causes of action. The first is the 'relation back' action under s. 47 of the Act to be read with s. 3 of the Act and this first cause of action is against both appellants. The second cause of action concerns only the first appellant under s. 52 (wrongly referred to s. 53B(2) of the Act) and as stated by the learned judge in his judgment, the second cause of action is more in the form of an alternative claim.

In his written submission before us counsel for the first appellant conceded:

(a) at all material times the first appellant was to a certain degree aware of the financial difficulties of his father, the bankrupt.

(b) the learned judge's finding that the conveyance was within the statutory period of six months set out in s. 47 of the Act for the purpose of the doctrine of relation back subject to the conveyance being a fraudulent one.

The facts are sufficiently set out in detail by the learned judge and I will only set out the facts that are relevant in considering the issues before the court.

Section 3 of the Act prescribes the acts of bankruptcy. From the evidence, the learned judge concluded that the bankrupt committed acts of bankruptcy under s. 3(1)(b) and 3(1)(i) of the Act. Section 3(1)(b) relates to a debtor making a fraudulent conveyance of his property and s. 3(1)(i) relates to the failure of the debtor to comply with the bankruptcy notice issued to him within seven days after service of the notice to pay the judgment debt or sum ordered to be paid in accordance with the terms of the judgment or order.

As it seems that there are more than one acts of bankruptcy, I need only quote the learned judge's decision on this issue. This is what the learned judge state in considering ss. 24 and 47 of the Act when he held that the first act of bankruptcy when there is more than one, must be between 16 February 1991 and 3 July 1992 at pp. 249-250:

> In order to consider the cause of action for relation back of the said property, pertinent sections of the Act needs to be considered. The first is section 24(1) of the Act which provides that a person is adjudicated a bankrupt at the time when a receiving order is made against him. Upon this "his property shall become divisible among his creditors and shall vest in the Official Assignee" under section 24(4) of the Act. However by virtue of section 47(1) of the Act a relation back of the bankrupt's property can occur for it provides:
>
> > The bankruptcy of a debtor, whether the same takes place on the debtor's own petition or upon that of a creditor, shall be deemed to have relation back to and commence at the time of the act of bankruptcy being committed on which a receiving order is made against him, or if the bankrupt is proved to have (been?) committed more acts of bankruptcy than one to have relation back to and to commence at the time of the first of the acts of bankruptcy proved to have been committed by the bankrupt within six months next preceding the date of the presentation of the bankruptcy petition.
>
> In brief, the first situation is where the bankruptcy relates back to the time when the act of bankruptcy was being committed on which a receiving order is made against him. However, and more relevant to our case, is where there had been more than one act of bankruptcy committed, then the relation back is to the first of the acts of bankruptcy committed by the bankrupt within 6 months after the presentation of the bankruptcy petition.

What then are the acts of bankruptcy committed in this case? Initially the act of bankruptcy on which the bankruptcy petition was founded was the failure of the father to satisfy the judgment sum obtained against him by UMBC stated in the Bankruptcy Notice served on him on the 29.5.1991. This act of bankruptcy falls within s. 3(1)(i) of the Act. The other act of bankruptcy which happened earlier and as claimed by the plaintiff is this transfer of the said property to the 1st defendant which the plaintiff alleged was a fraudulent conveyance within s. 3(1)(i)((b)?)of the Act.

Section 3(1)(i)((b)?) of the Act provides:

A debtor commits an Act of bankruptcy in each of the following cases:

(b) If in Malaysia or elsewhere he makes a fraudulent conveyance, gift, delivery or transfer of his property or of any part thereof;

xxx

As time is of essence here it is best to determine the exact period for consideration. The bankruptcy petition was presented on 15.8.1991 against the father. 6 months preceding this date would land us with the 16.2.1991. This means that the first act of bankrupt, when there is more than one, must be committed between 16.2.1991 and 3.7.1992 (the date the father was adjudicated a bankrupt).

It is not disputed that pursuant to the purported sale and purchase agreement executed on 22 September 1990 between the bankrupt and his son, the first appellant, in respect of the said property and up to the registration of the said property in the name of the first appellant on 26 March 1991 the bankrupt was not yet adjudicated a bankrupt though a judgment was entered against him by United Malayan Banking Corporation *vide* civil suit no. D2-23-1034-88 in the sum of RM5,130,596.45 earlier on 15 December 1989. It was the United Malayan Banking Corporation who took up the bankruptcy proceedings against the bankrupt and obtained receiving and adjudication orders against him on 3 July 1992.

In computing the time for the purpose of relation back under s. 47 of the Act in respect of the alleged fraudulent transfer of the said property as an act of bankruptcy, the learned judge, in my view, correctly took the date of the registration of the said property, that is, 26 March 1991 citing *Lian Keow Sdn. Bhd. (in liquidation) v. Overseas Credit Finance (M) Sdn. Bhd.* [1988] 2 MLJ 449 rather than the date of the execution of the alleged sale and purchase agreement, that is, 22 September 1990. He therefore correctly concluded thus at p. 253:

> The transfer of the said property to the 1st defendant took place on the 26.3.1991 and by elementary arithmetic this is well within the period of 6 months proceeding the date of presentation of the bankruptcy petition against the father which was on the 15.8.1991. Therefore the alleged fraudulent conveyance can still be considered for relation back under section 46 (47?) of the Act.

The First Appellant's Appeal

The central issue for consideration would then be the interpretation of the word "fraudulent" in s. 3(1)(b) of the Act. The word "property" referred to in s. 3(1)(b) of the Act must by the interpretation of the word "property" in s. 2 of the Act, *inter alia*, includes land. The issue is whether there was a fraudulent conveyance of the said property from the bankrupt to his son, the first appellant.

The learned judge, in my view, correctly addressed his mind on what tantamount to fraudulent in the context of bankruptcy legislation. He referred to p. 514 (p. 39?) of *Halsbury's Laws of England*, 4th edn, vol. 4:

> The word 'fraudulent' has received ... with reference to the bankruptcy question, a particular signification different from that which it is ordinarily used" (per Knight – Bruce VC, in *Re Marshall, ex parte Zwilchenbart* [1844] 3 Mont. D. & De G, 671.) There need not be more than a design to defeat or delay creditors, generally by some act which will prevent the distribution of the insolvent debtor's property in accordance with the bankruptcy law (*re Sinclair, ex parte Chaplin* [1884] 26 Ch. D 319, 53 LJ Ch. 732).

The learned judge proceeded to consider, what I would say, the factors for consideration in conveyances by bankrupts by reference to a local Court of Appeal case. It is *Re Khor Bak Kee* [1936] MLJ Rep. 5. This is what Thomas CJ (FMS) said at p. 6:

> In conveyances by bankrupts it is always necessary to consider the state of affairs at the time of the conveyance, the relationship of the respective parties, the sufficiency of the consideration, and in short all the surrounding circumstances.

Further on at p. 7, Thomas CJ (FMS) said:

> A conveyance which would not be fraudulent when the parties are solvent can be fraudulent in a bankruptcy, because the interests of other creditors have not been observed.

Having focused his mind on the meaning of 'fraudulent' in the context of bankruptcy legislation, the learned judge proceeded to analyse the facts, that is, whether there was sufficient evidence before him to conclude that there was a fraudulent conveyance in this case. He considered them broadly, in my view, under three categories. They are:

(1) the relationship of parties;

(2) the consideration in the purported sale and purchase agreement;

(3) the intention of the parties in the conveyance.

(1) Relationship Of The Parties (p. 253 of the judgment)

It is not disputed that the transfer of the said property is from the father (the bankrupt) to his son, the first appellant. Such being their relationship suspicion is inevitably arose as to whether the transaction is *bona fide* so as to defeat or delay the creditors. I must, however, say that mere suspicion is insufficient to show fraudulent. There must be facts to support a strong inference that it is a fraudulent conveyance within the meaning of s. 3(1)(b) of the Act.

Bearing in mind the age of the first appellant, that is, 25 years old at that time and drawing a salary of RM3,000 per month, the first appellant could still purchase another property referred to as the Sentul property with a declared value of RM600,000 within 1 1/2 months of the purchase of the said property for RM1 million no doubt with the financial assistance of the banks, the learned judge concluded p. 253:

> What strikes me is the close proximity of this transaction between each other as well as to the time when the family was facing severe financial hardship, the magnitude of the loans, and the almost similar proprietors.

(2) The Consideration In The Purported Sale And Purchase Agreement, (p. 253 of the judgment)

The learned judge had given detailed analysis on the consideration for the said property. He concluded thus (p. 254):

> To my mind, the theory of "to help my father" is completely an eye – wash; it is more like helping oneself or to help the father to defeat creditors.

(3) The Intention Of The Parties In The Conveyance (pp. 254-255 of the judgment)

The learned judge went on to examine in detail on this issue as it seemed the first appellant as the transferee denied that he was possessed of knowledge that his father, the bankrupt, was in dire financial situation at the material time

hoping to imply that the transfer was *bona fide*. However, before us, counsel for the first appellant conceded that to a certain degree he was aware of the financial difficulties of his father, the bankrupt.

The learned judge concluded thus (p. 255):

> Judging the conditions which the father and his family were in at the time, I find it probable that the father transferred the said property to the 1st defendant to ensure its safety from an impending financial disaster. The most appropriate person to safeguard it was the 1st defendant since he was the only male lineage who escaped the clutches of UMBC by not being a guarantor.

At the time of the hearing of this case before the court below, the bankrupt was dead and the learned judge was deprived of his testimony. Be that as it may there were witnesses including the first appellant called to testify in this case in the court below.

I have carefully examined the learned judge's analysis of the evidence and his finding of the facts and his assessment of the testimony of the relevant witnesses, I cannot possibly disagree with him.

In the circumstances I agree with the learned judge when he found that the transfer of the said property from the father, the bankrupt, to the first appellant was a fraudulent conveyance constituting an act of bankruptcy within s. 3(1)(b) of the Act and it is therefore void.

As the court below held that the transaction between the bankrupt and the appellant is void, it follows that by virtue of s. 53B(1) of the Act, the said property shall be deemed to be the property of the official assignee, the respondent.

Counsel for the first appellant further contended that even if the sale of the said property from the bankrupt to his son, the first appellant, is void (which is denied), does the respondent take the same without the burden of the Development and Commercial Bank's charge? He submitted that the Development and Commercial Bank was a secured creditor at the time of the execution of the alleged sale and purchase agreement and if the sale had not gone through the respondent would have to pay off the Development and Commercial Bank, the secured creditor. In the circumstances the first appellant contended that he should be reimbursed for the sum paid to discharge the charge. With respect, on the facts of this case, the argument of the first appellant is untenable. I therefore reject it. The Singapore cases of *Re Yeow Heap Seng ex p Official Assignee* [1965] 2 MLJ 67 and *Re Louis Theresa Khoo* [1965] 2 MLJ 223 cited, are of no assistance to the facts of this case.

In view of the decision of the learned judge on the first cause of action, I do not see the need of His Lordship to consider the second cause of action, which he himself said is more in the form of an alternative claim. I therefore do not find it necessary to consider it in view of his affirmative decision on the first cause of action.

The Second Appellant's Appeal

On 1 September 1993 the second appellant offered financial facilities to the first appellant which were accepted. The facilities were to be secured by way of two separate charges on the said property. The said property was at that time charged to Standard Chartered Bank.

The second appellant did all they could by conducting a search on the said property and a bankruptcy search on the first appellant. The searches confirmed that the said property was registered in the first appellant's name and that he was not a bankrupt. Save for the need to discharge the Standard Chartered Bank's charge which was disclosed, it would appear that there was no legal impediment or risks in respect of the said property for the second appellant to provide the loans to the first appellant. The learned judge himself said that the respondent never challenged during the trial that the second appellant acted *bona fide* in the loans granted to the first appellant over which the present two legal charges were registered against the said property.

Having accepted that the second appellant acted in good faith for the consideration of the loans to the first appellant, the learned judge, however, failed to consider the effect of s. 53B(3) which has reference to s. 53B(1) and (2) of the Act. Section 53B(3) reads:

> Notwithstanding subsections (1) and (2), where any person, (not being the person who acquired the property from the bankrupt) to whom the property was sold, resold or otherwise disposed of, had paid or given therefor valuable consideration and acted in good faith such person shall not be subject to the operation of this section and the Official Assignee's recourse for recovery of the consideration so paid or given or its value shall be solely against the person who entered into the transaction with the bankrupt.

The transfer of the said property to the first appellant may be avoided by the court on ground of fraudulent conveyance in which the court below so held and I agree, (see *PJTV Denson (M) Sdn. Bhd. & Ors. v. Roxy (M) Sdn. Bhd.* [1980] 2 MLJ 136. However, in respect of the second appellant, they are entitled to the protection of s. 53B of the Act as it is not disputed that they acted in good faith and for valuable consideration (see s. 53B(3)).

The question for consideration is what then is the effect on any registered interest should such an avoidance takes place? In this case, it is the registered legal charges in favour of the second appellant. Should the official assignee, the respondent, take the said property subject to the registered legal charges as is the contention of counsel for the second appellant?

As the said property involves land, it will only be vested in the respondent by way of registration as we practise the Torrens System in this country. Part twenty two of the Code provides for transmission on death and bankruptcy. The relevant section in this case is s. 349 and reads:

349. Registration of Official Assignee

(1) Where the Official Assignee claims any land, or share or interest in land, under any written law for the time being in force relating to bankruptcy, he may apply to the Registrar under this section for the registration thereof in his name, and the Registrar shall give effect to the application by endorsing a memorial of the transmission on the register document of title to the land in question or, as the case may be, the land in which the share or interest in question subsists.

(2) Every such memorial shall be signed and sealed by the Registrar, and a copy thereof shall, if he is able to secure its production, be made by him on the issue document of title to the said land or, where the memorial relates to a lease or charge, on the duplicate thereof.

(3) No land, share or interest shall vest in the Official Assignee under any adjudication of bankruptcy, or order for administration in bankruptcy, until it has become registered in his name pursuant to this section.

It is not disputed that the said property has not been registered under the name of the respondent. It is equally not disputed (and accepted by the learned judge) that the second appellant was a *bona fide* purchaser for value and without notice. It follows, in my view, that the respondent until registration of the said property pursuant to s. 349 of the Code in his name, is vested only with an equitable interest in the said property. In accordance with equitable principles, the legal interest in the charges acquired by the second appellant, as a *bona fide* purchaser for value and without notice, would overreach the respondent's equitable interest. (*Mercantile Bank Ltd. v. The Official Assignee of the property of How Han Teh* [1969] 2 MLJ 196).

Quite apart from the legal interest versus the equitable interest issue the first appellant's interest may be defeated due to his being privy to the fraud but the second appellant's interest, as the registered chargees, are indefeasible as the second appellant was a *bona fide* purchaser for value and without notice, (see s. 340(2) and (3) of the Code). The learned judge himself accepted the

vestment of the said property in the respondent in equity by relying on *Re Kwan Chew Shen T/A Syarikat Kaaf* [1987] 1 CLJ 314; [1987] CLJ (Rep) 704 where VC George J (as he then was) said:

> Having the Torrens System in particular s. 349 NLC in mind, it is obvious s. 24(4) of the Bankruptcy Act should be read subject to the requirement of s. 349, as far as land and interest in land is concerned. This is not to make for s. 24(4) to be pointless. Section 24(4) of the Bankruptcy Act and s. 349 of the NLC should be read as complementing each other. Section 24(4) in the context of the Torrens System has the effect that upon the adjudication of bankruptcy, land and interest in land belonging to the bankrupt vest in equity (and not in law) in the Official Assignee. It will only vest in the Official Assignee at law when the requirement of the law of registration as provided by s. 349 have been met.

The learned judge accepted what is stated above as a sound ruling and correct position of the law. I have no quarrel with that. The learned judge then proceeded to consider the issue of indefeasibility of registered title and interests under s. 340(1) of the Code. The learned judge after discussing the relevant subsections of s. 340 of the Code in particular s. 340(4)(b) and the judgment in *Krishnadas Achutan Nair & Ors v. Maniyam Samykano* [1997] 1 CLJ 636 concluded at p. 259:

> When this Court ruled that the conveyance between the father and the 1st defendant was fraudulent and therefore void, the title of the 1st defendant in the said property determined. When it determined, the concept of indefeasibility no longer applies by virtue of section 340(4) NLC, and since it determined by reason of the transfer being void, it relates back to the time of the transfer. This means that the 1st defendant had no title at any time to the said property. When he had no title to the said property he could not have created the legal charges in favour of the 2nd defendants since the legal charges subsist on the strength of the 1st defendant's claim to the title. They too have no protection of indefeasibility offered under section 340(1) NLC.

The purpose of s. 340(4)(b) of the Code was considered by the Federal Court in *Krishnadas Achutan Nair & Ors v. Maniyam Samykano* referred to by the learned judge. This is what Gopal Sri Ram JCA speaking for the Federal Court stated at p. 644:

> In our judgment, Parliament enacted s. 340(4)(b) for the purpose of dealing with fact patterns that do not fall squarely within the other exceptions to indefeasibility that appear in the second subsection to s. 340 of the Code. While recognizing that it is neither possible, nor desirable to predict with any degree of certainty the wide range of cases that, while failing to come within the vitiating categories specified by the second subsection, may yet come within the scope of s. 340(4)(b), we cite, by way of illustration only, cases decided under Moneylenders Act 1951.

The Federal Court went on to cite *Abirami MM & Anor. v. MSMM Meyappa Chettiar* [1959] MLJ 149 and *Overseas Union Finance Ltd. v. Lim Foo Chong* [1971] 2 MLJ 124 by way of illustration.

With respect, I agree with the contention of counsel for the second appellant that the learned judge erred in applying s. 340(4)(b) of the Code as having determined the bankrupt's title from the time of the alleged fraudulent conveyance, that is, 26 March 1991. Section 340(4)(b) is a savings provision and cannot operate by itself to determine any title or interests in land. It is the operation of s. 340(4)(b) which permits the determination of title or interest in land by operation of law as in this case, the Bankruptcy Act. It would appear that without s. 340(4) of the Code no registered title or interests are defeasible save for the instances set out in s. 340(2) of the Code.

In the case of bankruptcy and the operation of the Act, the determination of a bankrupt's interest in land can arise either:

(a) pursuant to s. 24(4) of the Act (the automatic vesting of the property) at the time of the adjudication of his bankruptcy, or

(b) upon the avoidance of a fraudulent conveyance.

However, taking into consideration the purport of s. 349 of the Code, the divesting of the bankrupt's interest in the land and the vesting of that interest in the official assignee, the respondent, in either of the above events, may only be effected by the endorsement of a memorial of transmission under s. 349(1) thereof. It is further provided by s. 349(3) that no land, share or interest shall vest in the official assignee under any adjudication of bankruptcy until it has become registered in his name pursuant to this section. In other words, it is not an automatic vesting in so far as land is concerned.

It seems clear that s. 340(4) only preserves the application of the Act in determining title and interests in land in bankruptcy whilst s. 349 of the Code effectuates the vesting of title and interests in the official assignee thereby divesting the title and interests of the bankrupt in the land. Therefore until the official assignee effectuates his rights under the Code no title to the land vests in the official assignee.

In this case, there was a finding of fraudulent transfer of the said property and it was avoided by the court below but the title to the said property is yet to be vested in the respondent pursuant to s. 349 of the Code as no action had been taken by the respondent to that effect. In that event until registration of the title of the said property in the respondent's name on behalf of the bankrupt, the respondent has only an equitable interest in the said property.

The Act itself by way of s. 53B(1) provides that in the event the acquisition of the property of the bankrupt is set aside, as in this case, the property shall be deemed to be the property of the official assignee and the official assignee may recover the property from the person who acquired it from the bankrupt or from any other person to whom the person may have sold, resold or transferred the property as fully and effectually as the official assignee could have recovered the property if it had not been so sold, transferred, or disposed of. However, s. 53(B)(3) of the Act provides exception to sub-ss. (1) & (2) of s. 53(B) if the subsequent acquirers give valuable consideration and acted in good faith in which case the recourse would be only as against the person who entered into the transaction with the bankrupt as in this case, the first appellant.

The second appellant acted in good faith and for valuable consideration in granting the loans to the first appellant and in executing the charges that were duly registered. This is not disputed. The respondent lodged a registrar's caveat very much later, sometime in 1994 and is therefore of no help.

In the circumstances I am of the view that the respondent would have to take the said property subject to the second appellant's charges and I so rule accordingly.

Orders

For the reasons stated I would make the following orders.

In respect of the first appellant, the appeal is dismissed with costs. The deposit is to go towards taxed costs.

In respect of the second appellant, the appeal is allowed with costs. The order of the learned judge is set aside. The deposit is to be refunded.

My learned brother, Gopal Sri Ram JCA, has seen this judgment and agreed with it.

This judgment is given pursuant to s. 42 of the Courts of Judicature Act 1964.